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In the Supreme Court of the United States

OCTOBER TERM, 1959

KIRKHAVEN CORPORATION, PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. 19-23) is reported at 273 F. 2d 314. The order of the National Labor Relations Board (R. 326-330) is unreported.

JURISDICTION

The judgment of the court below was entered on January 5, 1960, and a petition for rehearing was denied on January 26, 1960 (Pet. 2). The petition for a writ of certiorari was filed on February 27, 1960. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the Board properly rejected, as untimely, exceptions to a trial examiner's intermediate report which were delivered to the Board after expiration of the time for filing exceptions.

2. Whether, in view of the lack of timely exceptions, the court below properly enforced the Board's order without examining, or requiring the Board to examine, the merits of the case.

STATUTE INVOLVED

Section 10 (c) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 160(c)), provides in pertinent part:

> * * * In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

Section 10 (e) and (f) of the Act is reprinted in the petition (Pet. 24-26). The pertinent rules and regulations of the Board are reprinted at R. 301-306.

STATEMENT

Following investigation of a charge filed by Lodge No. 1947, International Association of Machinists, AFL-CIO (the "Union"), the General Counsel of the Board issued a complaint alleging that petitioner had discriminatorily refused to recall for employment an employee because of his union activities, thereby violating Section 8 (a) (1) and (3) of the Act (R. 287-288). The Company denied the allegations. After the hearing, the Trial Examiner on December 29, 1958 issued his "Intermediate Report and Recommended Order," in which he found that petitioner had violated the Act as charged, and recommended issuance of the customary order directing the Company to cease and desist from its unlawful conduct, to reinstate the employee with back pay, and to post appropriate notices (R. 287-300).

In accordance with its rules, the Board on the same day the Intermediate Report was filed entered an order transferring the case to the Board (R. 303-306). The Order expressly stated: "Exceptions to the Intermediate Report in this case must be received by the Board in Washington, D. C., on or before Jan. 21, 1959" (R. 301). It further stated: "Attention is specifically directed to the excerpts from the [Board's] Rules and Regulations appearing on the page attached hereto." These excerpts included provisions requiring that exceptions to the Intermediate Report be filed "within 20 days, or within such further period as the Board may allow, from the date of the service of the order transferring the case to the Board" (Sec.

102.46, R. 302); that "[r]equests for an extension must be received by the Board 3 days prior to the due date" (Sec. 102.46, R. 302); that "[i]n the event no statement of exceptions is filed as herein provided * * * [the] intermediate report and recommended order shall be adopted by the Board and become its * * * order, and all objections and exceptions thereto shall be deemed waived for all purposes" (Sec. 102.48, R. 303); and that exceptions "must be received by the Board * * * before the close of business of the last day of the time limit, if any, for such filing or extension of time that may have been granted" (Sec. 102.91-(b), R. 306).

The foregoing documents—the Intermediate Report and Recommended Order of the Trial Examiner, and the Order Transferring Case to the Board together with the attached excerpts from the rules—were received by petitioner's counsel on December 31, 1958 (Pet. 4).

Petitioner mailed its exceptions from Milwaukee on January 21 (the date specified by the Board for their filing in Washington), and they were received by the Board on January 22 (R. 313, 314; Pet. 4). On the latter day, the Union telegraphed the Board, opposing acceptance of the exceptions (R. 313). On January 23, the Board returned the exceptions to petitioner as untimely filed (R. 314).

On February 2, 1959, petitioner filed a motion with the Board to accept the late-filed exceptions, and the next day the Union filed an opposition to the motion (R. 315, 325; Pet. 5). On February 9, the Board

issued its Order, adopting the recommended order of the Trial Examiner "pursuant to Section 10(c) of the * * * Act, as amended, and Section 102.48 of the * * * Board Rules and Regulations" (R. 326-330). The Board denied petitioner's motion for acceptance of the exceptions, because "there is no reasonable doubt as to the date the [petitioner's] exceptions were due in Washington, D.C., and no adequate reason has been given for the delay" (J.A. 326, p. 1).

The court below sustained the Board's refusal to entertain the untimely exceptions, and entered an enforcement decree. Noting that petitioner had not shown any extraordinary circumstances to excuse its failure to file timely exceptions before the Board, the court declined to consider the exceptions, or to remand the case to the Board to require it to do so (Pet. 19-23).

ARGUMENT

This case involves only the narrow issue whether the Board justifiably rejected, as untimely, exceptions to a trial examiner's intermediate report that were not filed within the period specifically provided by the Board's order accompanying the intermediate report. We submit that the court of appeals correctly sustained the Board's refusal to consider the untimely exceptions, and that the court therefore properly enforced the Board's order without inquiry into the merits of the exceptions. Furthermore, the correctness of the ruling below presents no question of general importance, but turns upon the facts of this particular case.

1. The Board's rejection of the exceptions as un-

timely was in accord with the settled principle of both judicial and administrative practice that, where a time limit for taking an appeal or filing exceptions is prescribed by statute, appeals or exceptions filed out of time may be rejected. See *Territo* v. *United States*, 358 U.S. 279; *Howard* v. *Local 74*, 208 F. 930, 932 (C.A. 7); *Hilker & Bletsch* v. *United States*, 210 F. 2d 847, 849-850 (C.A. 7); *Lewis-Hall Iron Works* v. *Blair*, 23 F. 2d 972 (C.A. D.C.); *Casalduc* v. *Diaz*, 117 F. 2d 915 (C.A. 1); *Poynor* v. *Commissioner*, 81 F. 2d 521 (C.A. 5); *Dayton Power & Light Co.* v. *Federal Power Commission*, 251 F. 2d 875, 877 (C.A. D.C.). Compare *United States* v. *Robinson*, 361 U.S. 220.

Section 10(c) of the Act (*supra*, p. 2) provides that "if no exceptions are filed within twenty days [or 'such further period as the Board may authorize'] after service" of the examiner's proposed report and order, "such recommended order shall become the order of the Board * * *." The Board's order in the instant case expressly stated that exceptions thereto "must be received by the Board in Washington, D. C., on or before Jan. 21, 1959" (R. 301). Admittedly, the exceptions were not received by the Board until after that date and, as the Board held in refusing to accept the untimely filing, "no adequate reason has been given for the delay" (J.A. 326, n. 1). In these circumstances, the Board was warranted in rejecting the exceptions as untimely filed.

Contrary to petitioner's contention (Pet. 9-13), the decision below is not in conflict with *National Labor Relations Board* v. *International Woodworkers of America*, 238 F. 2d 378 (C.A. 9). There the court held

(p. 379) that the failure to make timely filing was the result of circumstances "so extraordinary that the Board should have considered the objections," namely, that the exceptions "were not delivered to the office of the Board on [the due] day because the office of the Board had closed at 4:00 p.m." as the result of a severe snowstorm.[1] In the instant case, however, petitioner's Motion for Acceptance presented no comparable "extraordinary" circumstances, but only the excuse that petitioner believed that mailing of the exceptions constituted their "filing" with the Board (J.A. 315-324). The Board's order, however, explicitly stated that any exceptions "must be *received* by the Board in Washington, D. C." by the stated date (emphasis added).

2. The courts of appeals, following decisions of this Court, have repeatedly held that they may not examine issues as to which no exceptions were filed with the Board, and that, in the absence of exceptions or extraordinary circumstances, the Board's order should be enforced.[2] Petitioner's contention (Pet. 6-8, 15-18) that

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[1] While the fact of such snowstorm was not referred to in the *International* opinion, the court below in the instant case took judicial notice of that fact in distinguishing *International*.

[2] Decisions of this Court: *National Labor Relations Board* v. *District 50*, 355 U.S. 453, 463-464; *Marshall Field & Co.* v. *National Labor Relations Board*, 318 U.S. 253, 255-256; *National Labor Relations Board* v. *Cheney California Lumber Co.*, 327 U.S. 385, 388-389; *National Labor Relations Board* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 350; *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U.S. 492, 496-501.

Decisions of the Courts of Appeals: *National Labor Relations Board* v. *Noroian*, 193 F. 2d 172 (C.A. 9); *National Labor Relations Board* v. *Auburn Curtain Co.*, 193 F. 2d 826 (C.A. 1); *National Labor Relations Board* v. *Perry*, 244 F. 2d 17 (C.A. 4);

raising an issue before the examiner entitles a party to judicial review of that issue even in the absence of exceptions properly filed with the Board [3] would nullify this settled principle. Since Section 10(c) precludes the Board from reviewing a case in which no timely exceptions have been filed, the rule limiting judicial review to matters presented to the Board ordinarily requires judicial enforcement of Board orders in cases where no timely exceptions have been filed with the agency. The exception for cases where the Board "has patently traveled outside the orbit of its authority so that there is, legally speaking, no order to enforce" (*National Labor Relations Board* v. *Cheney California Lumber Co.*, 327 U.S. 385, 388) obviously is not here applicable.

National Labor Relations Board v. *Pugh & Barr*, 194 F. 2d 217 (C.A. 4); *Kovach* v. *National Labor Relations Board*, 229 F. 2d 138, 143 (C.A. 7); *National Labor Relations Board* v. *Shedd-Brown Mfg. Co.*, 213 F. 2d 163, 166 (C.A. 7).

[3] The dictum to that effect in *National Labor Relations Board* v. *Red Spot Electric Co.*, 191 F. 2d 697 (C.A. 9), upon which petitioner relies (Pet. 6-8), was subsequently rejected by the Ninth Circuit in *National Labor Relations Board* v. *Noroian*, 193 F. 2d 172, 173. In *Noroian*, where "[n]o statement of exceptions to the intermediate report was filed by respondents within the time required by law," the court, in summarily enforcing the Board's order, stated: "This court as now constituted is of the opinion that it is required by * * * [Section 10(e) of] the Act * * * to enter the decree enforcing the [Board's] order * * *."

CONCLUSION

For the reasons stated the petition for a writ of certiorari should be denied.

Respectfully submitted,

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